International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 433 (RPM Erectors, Inc.) *and* Waldo F. Kusterns. Case 21–CB–7122

February 11, 1983

DECISION AND ORDER

BY CHAIRMAN MILLER AND MEMBERS JENKINS AND HUNTER

On July 29, 1982, Administrative Law Judge Joan Wieder issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions[1] of the Administrative Law Judge only to the extent consistent herewith.

[1] In sec. III, B, par. 2, of her Decision, the Administrative Law Judge found that Joe Ward, Respondent's financial secretary-treasurer and business manager, told Waldo Kusterns, a member of Respondent, that he would not dispatch Kusterns to a job because Kusterns was in arrears in his supplemental dues. In fn. 9 and Conclusion of Law 4, the Administrative Law Judge concluded that Ward's statement is a violation of Sec. 8(b)(1)(A) and (2) of the Act. We agree that the statement constitutes a violation of Sec. 8(b)(1)(A), but we find that it does not constitute an attempt to cause an employer to discriminate against an employee in violation of Sec. 8(a)(3). We will amend the Administrative Law Judge's Conclusions of Law accordingly.

In that same section of the Decision, par. 4, the Administrative Law Judge alluded to the doctrine of *res judicata* in her discussion of whether the complaint properly alleged that Respondent refused to refer Kusterns for employment in a bargaining unit different from the one in which he incurred his dues liability. We find that the complaint allegation was sufficient to apprise Respondent of the complained-of conduct and, further, that the issue of separate units *vel non* was fully and fairly litigated. We note, however, that the doctrine of *res judicata* has no application in this context. *Res judicata* is the doctrine that a final judgment is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies. 46 Am. Jur. 2d *Judgments* § 46 (1969).

Finally, in sec. III, E, 1, the Administrative Law Judge rejected Respondent's contention that the doctrines of *res judicata* and collateral estoppel preclude the General Counsel from litigating the issue of whether Kusterns must attempt to exhaust his contractual remedies. Respondent's contention is based on a decision of a California state court which held that the plaintiffs, including Kusterns, must exhaust their contractual remedies before they may bring an action in state court alleging that Respondent breached the collective-bargaining agreement. We agree with the Administrative Law Judge that there is no merit in Respondent's *res judicata* and collateral estoppel defenses. In this connection, we note that the Board has found that a state court adjudication does not bar subsequent relitigation of the same issue before the Board. See, e.g., *B. G. Costich & Sons, Inc.*, 243 NLRB 79, 81 (1979), reversed on other grounds 613 F.2d 450 (2d Cir. 1980). Here, utilization of the contractual grievance procedure is not mandatory because the interest of the employee is clearly in conflict with that of the Union, as was found in *International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 433 (The Associated General Contractors of California, Inc.)*, 228 NLRB 1420, 1439–40 (1977), enfd. 600 F.2d 770 (9th Cir. 1979).

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 4 and renumber the subsequent Conclusion of Law accordingly:

"4. By failing and refusing to refer Waldo F. Kusterns to employment at RPM Erectors, Inc., at Lankersheim Boulevard, North Hollywood, California, because he failed to pay dues although he was under no obligation to do so in order to obtain such employment, Respondent has violated Section 8(b)(1)(A) and (2) of the Act.

"5. By telling Waldo F. Kusterns that it would not refer him to employment at RPM Erectors, Inc., at Lankersheim Boulevard, North Hollywood, California, on November 21, 1979, because he failed to pay dues although he was under no obligation to do so in order to obtain such employment, Respondent has violated Section 8(b)(1)(A) of the Act."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 433, Los Angeles, California, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Failing and refusing to refer Waldo F. Kusterns to employment at RPM Erectors, Inc., at Lankersheim Boulevard, North Hollywood, California, because he failed to pay dues although he was under no obligation to do so in order to obtain such employment.

(b) Telling Waldo F. Kusterns that it will not refer him for employment at RPM Erectors, Inc., at Lankersheim Boulevard, North Hollywood, California, because he failed to pay dues although he was under no obligation to do so in order to obtain such employment.

(c) Telling employees or applicants for employment that it was dispatching referrals in derogation of the established contractual hiring hall procedure.

(d) Denying hiring hall referral registrants the right to review and inspect the dispatch book maintained by Respondent in the operation of its hiring hall.

(e) In any like or related manner restraining or coercing employees or applicants for employment in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Notify RPM Erectors, Inc., in writing, with a copy furnished to Waldo F. Kusterns, that it has no objection to the hiring or employment of Kusterns, and request RPM Erectors, Inc., to hire Kusterns for the employment which he would have had were it not for Respondent's unlawful conduct, or for substantially equivalent employment.

(b) Make whole Waldo F. Kusterns for any loss of pay and benefits he may have suffered by reason of the discrimination practiced against him, in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all records pertaining to employment through its hiring hall, and all records relevant and necessary for compliance with this Order.

(d) Post at all places where notices to members and applicants for referral are posted copies of the attached notice marked "Appendix."[2] Copies of said notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 21, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[2] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT fail and refuse to refer Waldo F. Kusterns to employment at RPM Erectors, Inc., at Lankersheim Boulevard, North Hollywood, California, because he failed to pay dues although he was under no obligation to do so in order to obtain such employment.

WE WILL NOT tell Waldo F. Kusterns that we will not refer him for employment at RPM Erectors, Inc., at Lankersheim Boulevard, North Hollywood, California, because he failed to pay dues although he was under no obligation to do so in order to obtain such employment.

WE WILL NOT tell employees or applicants for employment that we dispatch referrals in derogation of the established contractual hiring hall procedure.

WE WILL NOT deny hiring hall referral registrants the right to review and inspect the dispatch book maintained by us in the operation of our hiring hall.

WE WILL NOT in any like or related manner restrain or coerce employees or applicants for employment in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL notify RPM Erectors, Inc., in writing, with a copy furnished to Waldo F. Kusterns, that we have no objection to the hiring of Kusterns, and request RPM Erectors, Inc., to hire Kusterns for the employment which he would have had were it not for our unlawful conduct, or for substantially equivalent employment.

WE WILL make whole Waldo F. Kusterns for any loss of pay and benefits he may have suffered by reason of the discrimination practiced against him, with interest.

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, Local No. 433

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge: This case was heard before me in Los Angeles, California, on April 1, 1982,[1] pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 21 on June 17, 1981, and which is based on a charge filed by Waldo F. Kusterns, an individual, on November 21, 1971. The complaint alleges that International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 433, herein called Respondent or Union, has engaged in certain violations of Section 8(b)(1)(A) and (2) of the National Labor Relations Act, as amended (herein called the Act).

Issues

The complaint alleges in substance that Respondent coerced applicants for job referrals by informing them that the Union's agents were making referrals in derogation of the contractual and established hiring hall procedures (referred to herein as "back dooring"); threatening

[1] All dates herein refer to 1979 unless otherwise indicated.

Kusterns, who was on the referral list, with physical harm when he asked to see the dispatch book in order to discourage him from making such requests in the future; and refusal to refer Kusterns to employment with RPM because he had not paid his supplemental dues under provisions of a collective-bargaining agreement different from RPM's. Respondent admits in its defense that it refused to refer Kusterns to the RPM job but asserts that such refusal was lawful. The Union also denies committing any violations of the Act and raises the affirmative defense of collateral estoppel.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and Respondent on May 6, 1982.

Upon the entire record of the case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS

Respondent admits that the Employer, RPM Erectors, Inc., is a California corporation engaged in the erection of nonstructural metals which maintains a principal place of business in San Ramon, California. It further admits that during the past year, in the course and conduct of its business, the Employer has provided services valued in excess of $50,000 to customers located outside the State of California. Accordingly, it admits, and I find, that the Employer is engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits and I find that it is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Based on stipulations and uncontroverted record evidence, it is found that Waldo F. Kusterns worked for an employer named Guy F. Atkinson Construction Company on a job at Diablo Canyon in California, from late July 1978 to February 2, 1979. Kusterns has been a member of the Union since 1973. The jobsite was covered by a multiemployer collective-bargaining agreement referred to as the District Council Agreement,[2] which had a provision requiring the payment of supplemental dues in the amount of 15 cents an hour for every hour worked.[3] Kusterns, among others, refused to pay this supplemental dues obligation[4] which the parties stipulated was lawfully incurred and owed to the Union. The Union is a member of the District Council and is a party to the District Council Agreement. This agreement contains a union-security clause requiring employees of signatory employers to become members on the eighth day of their employment. Section 5 of the District Council Agreement indicates that Respondent operates an exclusive hiring hall which is not claimed to be unlawful and appears consonant with the requirements of *Local 357, Teamsters [Los-Angeles-Seattle Motor Express]* v. *N.L.R.B.*, 365 U.S. 667 (1961). Also the testimony reveals that the Union's operating procedures were those of an exclusive hiring hall.

B. *The Alleged Refusal To Dispatch*

Kusterns signed Respondent's out-of-work book in June 1979 and was assigned the highest number in his classification. The lower the number, the closer the individual is to the top of the dispatch list. Respondent's business agents act as dispatchers on a weekly rotational basis. The dispatcher sits in a raised glassed-in booth, announces the jobs available, and the individuals in the hiring hall can bid on these jobs. The bidder(s) with the lowest number(s) in the appropriate classification is the individual dispatched on the job.

On or about November 20, 1979, Joe Ward[5] asked Kusterns to work for RPM. Kusterns replied he wished to "think about it." About 1-1/2 hours later, Kusterns bid on the job. Ward checked and ascertained that Kusterns was in arrears in his supplemental dues payments, therefore the Union declined to dispatch Kusterns on that date and someone else with a higher number was dispatched in his place. Kusterns was number 3 on the A list on this date. The two individuals ahead of him on the list were not bidding on jobs.[6] Therefore, absent the supplemental dues arrearages, Kusterns would have been dispatched ahead of the individual who was referred to the RPM job. The following day, November 21, Kusterns agains asked Ward to dispatch him to the RPM job. According to Kusterns, whose testimony was not directly refuted and is credited based on demeanor, inherent probabilities, and demonstrated clarity of recall of events, Ward replied to the request, saying "Fuck, no, I won't dispatch you. You haven't paid the supplemental dues." Respondent admitted refusing to dispatch Kusterns to the RPM job.[7] Kusterns admitted that profane

[2] The document is formally titled "Iron Worker Employers State of California and a Portion of Nevada . . . and District Council of Iron Workers of the State of California and Vicinity . . . ." Guy F. Atkinson belonged to a multiemployer association which was a signatory to this agreement.

[3] The provision also required its members to sign cards authorizing the California Field Iron Workers Vacation Trust Fund to deduct the stated amount from the sum the employer contributes for each working man.

[4] Kusterns joined with others in challenging the legality of the supplemental dues and the matter was apparently settled prior to the hearing herein.

[5] In 1979 Ward was employed by Respondent as a business agent. Concurrently he is the financial secretary-treasurer and business manager of the Union. Ward is an agent of Respondent. See *Carpenters District Council of Denver and Vicinity (Hensel Phelps Construction Co.)*, 222 NLRB 551, 553, fn. 2 (1976).

[6] In fact, there was a shortage of iron workers in Los Angeles, and Kusterns could have had almost any job he bid on from July, shortly after he signed the out-of-work book, until February 20 and thereafter.

[7] Ward testified that on November 20 he told Kusterns he could not give him the job because he owed supplemental dues; therefore he refused to dispatch him. He did not testify about any events occurring on November 21.

language was frequently used at the hiring hall, albeit not on the part of business agents. On February 28, 1980, Kusterns was dispatched to a job at RPM after agreeing to pay the arrearages in supplemental dues payments, and C. W. Lansford, the financial secretary-treasurer and business manager of the Union, advanced the money for such payment to him. Kusterns did pay his supplemental dues on March 31, 1980.

Counsel for the General Counsel argues that RPM is signatory to a collective-bargaining agreement different from that under which Kusterns incurred his dues delinquencies, hence the Union's refusal to refer Kusterns violated Section 8(b)(1)(A) and (2) of the Act.[8] It is well settled that unions cannot lawfully require an employee to satisfy a dues arrearage incurred in one bargaining unit as a condition precedent to employment in a different unit. See *Iron Workers Local 118, International Association of Bridge and Structural Ironworkers, AFL-CIO (Pittsburgh Des Moines Steel Company)*, 257 NLRB 564 (1981); *Millwright and Machinery Erectors, Local Union No. 740, et al., AFL-CIO (Tallman Constructors, a Joint Venture)*, 238 NLRB 159, 160–161 (1978); *William Blackwell, d/b/a Carolina Drywall Company*, 204 NLRB 1091, (1973); *International Union of Operating Engineers, Local No. 139 and its Agent Leroy Fitzsimmons (T. J. Butters Construction)*, 198 NLRB 1195 (1972). Cf. *N.L.R.B.* v. *Campbell Soup Company, et al.*, 378 F.2d 259 (9th Cir. 1967), cert. denied 389 U.S. 900 (employer and union violated Act by conditioning employment upon payment of union dues during the first 30 days of employment); *N.L.R.B.* v. *Spector Freight Systems Inc., et al.*, 273 F.2d 272, 276 (8th Cir. 1960), cert. denied 362 U.S. 962 ("payment of [union] dues or other debts accruing . . . prior to employment, may not be required as a condition of continued employment").[9]

Respondent argues that different collective-bargaining agreements are not involved herein, that the RPM job and the Guy F. Atkinson project were subject to the same agreement. Respondent further argues that the General Counsel has not raised the issue of whether Kusterns sought referral under a different collective-bargaining unit as opposed to referral under a different collective-bargaining agreement inasmuch as the complaint alleges that the unlawful action was the failure to refer Kusterns because he "had not paid his supplemental dues under provisions of a collective-bargaining agreement different from RPM's."[10] Hence, Respondent avers, the doctrine of *res judicata* obtains in these circumstances. This argument is found to be without merit. The record is replete with evidence relative to the unit issue and was adduced without objection. Further, Respondent put in substantial record evidence. On this issue also, the bare allegation of *res judicata* is not accompanied by any proffer or argument that consideration of the "unit" issue would be prejudicial. Therefore, even assuming *arguendo* that no such allegation was made in the complaint, the issue has been fully and fairly litigated. See *Clear Pine Mouldings, Inc.* v. *N.L.R.B.*, 632 F.2d 721, 728 (9th Cir. 1980); *N.L.R.B.* v. *Olympic Medical Corporation*, 608 F.2d 762, 763 (9th Cir. 1979). However, it is found that the complaint did contain the unit issue for, as stated above, the refusal to refer because of failure to pay supplemental dues "under provisions of a collective-bargaining agreement different from RPM's" is violative of the Act only if the obligation to pay the supplemental dues was incurred in a bargaining unit different from the bargaining unit involved in the refusal to refer. Accordingly, the complaint is found to have met the requirement of due process by fairly apprising the Union of the charges against it. See *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 349–351 (1938); *Consumers Power Company* v. *N.L.R.B.*, 113 F.2d 38, 43 (6th Cir. 1940) ("Matters of evidence need not be recited in the complaint"). See also *N.L.R.B.* v. *Antonino Carilli, d/b/a Antonino's Restaurant*, 648 F.2d 1206, 1211 (9th Cir. 1981) ("Actions before the Board are not subject to the technical pleading requirements of a private lawsuit"). Thus the dispositive issue is whether Kusterns incurred a dues arrearage in a bargaining unit different from that covering the RMP job. To resolve this question, it must be determined which of the contracts RPM signed was applicable to the RPM job on Lankersheim Boulevard in North Hollywood, California.

There is no question that the supplemental dues obligations were incurred while Kusterns was employed by Guy F. Atkinson, which was governed by the District Council Agreement. Hence, the dues obligation was incurred in the District Council unit. Willy Francis, the office manager of Guy F. Atkinson Construction Company, testified that the only agreement with the Iron Workers the company was party to was the District Council Agreement. According to Walter Radtke, the president of RPM, when the company was incorporated in 1968 he signed an independent memorandum agreement with Local Union 378, International Association of Bridge, Structural and Ornamental Iron Workers, the local operative at his principal place of business, which incorporated by reference the District Council Agreement.[11] Ac-

[8] Sec. 8(b)(1)(A) and (2) provides:

> It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce (a) employees in the exercise of the right guaranteed in Section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . .

[9] Further, a threat to commit a violation of Sec. 8(b)(1)(A) and (2) of the Act is in itself an unfair labor practice. See *N.L.R.B.* v. *International Longshoremen's & Warehousemen's Union, Local 13*, 581 F.2d 1321, 1322–23 (9th Cir. 1978), cert. denied 440 U.S. 935 (1979).

[10] Par. 11 of the complaint.

[11] As here pertinent, the memorandum agreement provides:

> When the Master Agreement is terminated or open for modification or amendment, on notice thereunder, either party to this agreement may terminate this agreement on one hundred twenty (120) days written notice to the other.
>
> During the effective life of this agreement at such time as the Master Agreement may be no longer in force or effect due to effective termination thereof, then and in that event, the parties to this

Continued

cording to Radtke's uncontroverted testimony, this agreement has never been terminated or canceled and is still in effect. Thus, he believes RPM was bound to the District Council Agreement which, as here pertinent, was in effect from July 1, 1977, through June 30, 1980. There was no showing that RPM participated in the negotiating of the multiemployer, multilocal union agreement. The District Council Agreement covers geographically the State of California and certain named counties in the State of Nevada.

On January 12, 1970, RPM Erectors signed an agreement with the International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, to facilitate their conduct of out-of-state business. This agreement, hereinafter called the International Agreement, has not been canceled by either RPM or the International. The International Agreement provides in part:

> 1. This agreement becomes effective January 12, 1970, and shall continue in effect until terminated by three months' written notice from either party to the other. Changes may be made at any time by mutual consent.
>
> 2. This agreement shall be effective in all places where work is being performed or is to be performed by the Employer—or by any person, firm or corporation owned or financially controlled by the Employer, and covers all work coming under the jurisdiction of the Association.
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> 3. The Employer recognizes the Association as the sole and exclusive bargaining representative for all employees employed on all work coming under the jurisdiction of the Association.
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> 4. The Employer agrees not to sublet any work under the jurisdiction of the Association or its local unions—to any person, form or corporation not in contractual relationship with this Association of its affiliated Local Unions.
>
> 5. All employees who are members of the International Association of Bridge, Structural and Ornamental Iron Workers on the effective date of this contract shall be required to remain members of the Association in good standing as a condition of employment during the term of this contract. All employees may be required to become and remain members of the Association in good standing as a condition of employment from and after the thirty-first day following the dates of their employment, or the effective date of this contract, whichever is later. (This clause shall be effective only in those states permitting Union Security.)
>
> 6. The Employer agrees to abide by the General Working Rules of this Association and to pay the scale of wages, work the schedule of hours and conform to the conditions of employment in force and effect in the locality in which the Employer is performing or is to perform work, provided that such conditions are not in violation of the National Labor Relations Act.
>
> 7. The Employer agrees to employ Journeymen in any territory where work is being performed in accordance with the Referral Plan in force and effect in the jurisdiction of the Local Union where such work is being performed or is to be performed, a sample copy of which Referral Plan is annexed hereto marked "Appendix A" and made a part hereof.[12]
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> * * * * *
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> 9. In case a dispute arises which involves a question of the scale of wages or the General Working Rules of the Association, the matter shall be referred to the General President of the International Association of Bridge, Structural and Ornamental Iron Workers and he or his representative shall meet with a representative of the Employer who shall take steps at once to ascertain the facts and render a decision thereon.
>
> Where the dispute involves a scale of wages any decision rendered shall be retroactive to the date on which the dispute originated.
>
> In case the representative of the Employer and the representative of the Association are unable to reach an agreement on the facts in the case they may select an agency mutually agreeable to them to hear and pass upon the case in dispute.

agreement shall operate as Employer and Labor Organizations strictly under the terms of the General Working Rules and working conditions and wage scale of the Union [Local 378].

Conclusions

There are several differences between the International agreement and the District Council agreement. The union-security provisions of the two agreements are different. In the International agreement, the employee is to become or remain a member in good standing of the association as a condition of employment from and after the 31st day of employment, whereas the District Council agreement requires the individual to become a member after the 8th day of employment. There is no language in either of the agreements which resolves which contract necessarily prevails in the event of an inconsistency. Therefore, argues counsel for General Counsel, the latter contract supersedes the former contract as to inconsistent provisions, citing *N.L.R.B.* v. *International Union of Operating Engineers Local No. 12, AFL-CIO*, 323 F.2d 545 (9th Cir. 1963). There was no showing that the two agreements were inconsistent regarding referral procedures. In fact, the International agreement requires the employer to agree to "conform to the conditions of employment in force and effect in the locality in which the employer is performing or is to perform work . . . in accordance with the Referral Plan in full force and effect in the jurisdiction of the Local Union where such work is being performed or is to be performed." However, the instant proceeding is similar

[12] The referral plan describes the number of employees an employer may hire directly and under what circumstances; how the union shall register, select, and refer applicants for employment; the order of referral; the local union's obligations; and provisions requiring both the employer and the local union to post "in all appropriate places all provisions relating to the hiring arrangements set forth in this agreement."

to that situation which obtained in *Iron Workers Local 118, International Association of Bridge and Structural Ironworkers, AFL–CIO (Pittsburgh Des Moines Steel Company), supra* at 566, fn. 6, wherein the national agreement specifically stated that the local agreement, called the multitrade project agreement, takes precedence over it; and therefore, the Board found:

> Although all subcontractors, including PDM, were required to sign the National Agreement, merely signing that preexisting agreement did not make them part of the multiemployer unit created by it since there must be an unequivocal intention on the part of the employer to be bound by group, rather than individual, action. *Schaetzel Trucking, Inc.*, 250 NLRB 321 (1980); *New York Typographical Union 6 (Royal Composing Room, Inc.)*, 242 NLRB 378 (1979). There is no evidence of such an intention here.

RPM is not listed as an employer in the District Council agreement nor has it been shown that it was a member of any multiemployer groups which have actively engaged in the negotiating of the agreement. Conversely, Guy F. Atkinson Construction Company was a member of the Associated General Contractors of California, which was named as a signatory in the District Council agreement. Finally, the duration and termination provisions of the memorandum agreement contains appropriate terms and conditions which would obtain in the event the District Council agreement is no longer in full force and effect, indicative of the independence of the parties from the master agreement. Accordingly, even assuming *arguendo*, that the International agreement issue did not exist, there is no basis to find that Guy F. Atkinson Construction Company and RPM were in the same multiemployer unit. As found in *Moveable Partitions, Inc.*, 175 NLRB 915 (1969), the intent to become part of a multiemployer unit cannot be based solely on the adoption by that employer of a contract negotiated by a multiemployer association of which the employer was not a member. There is no record evidence that RPM authorized any association to negotiate on its behalf, engaged in any meaningful joint bargaining, nor did RPM authorize the District Council to negotiate on its behalf. See *Texas Cartage Company*, 122 NLRB 999 (1959), where adoption of an areawide agreement by an employer who never participated in group negotiations and never authorized any agent to negotiate on its behalf does not make the employer part of the multiemployer unit. Cf. *Laundry Owners Association of Greater Cincinnati*, 123 NLRB 543 (1959). Therefore, it is concluded that RPM's adoption of contracts negotiated by the multiemployer association is not a sufficient basis to find a clear intent to be included in a multiemployer unit and that a unit comprised solely of its employees is inappropriate or inconsistent. Further, the documents executed by RPM do not authorize any multiemployer association to bargain on its behalf nor does it have to terminate any membership in such multiemployer association before it can terminate the memorandum agreement.

In sum, it is found that RPM Erectors, Inc., was not a member of the same multiemployer unit as Guy F. Atkinson Construction Company. RPM Erectors' agreement is a separate contract between Respondent and RPM whereby RPM agreed to be individually bound by the results of any future agreement between the Union and the multiemployer association or associations that negotiated the District Council agreement. See *New York Typographical Union 6, supra*. Therefore, the Union could not lawfully require Kusterns to satisfy a dues arrearage incurred in the Atkinson bargaining unit as a condition of employment in the RPM unit. See cases cited above.

Assuming *arguendo* that RPM Erectors, Inc., was part of the same multiemployer unit as Atkinson, then counsel for General Counsel's argument, together with Respondent's rejoinder, must be considered. Kusterns' dues obligation would then have come under the District Council Agreement, which has a different union-security provision than the International Agreement. As noted by the Board in *Iron Workers Local 118, et al. (Pittsburgh Des Moines Steel Company), supra* at 566:

> Thus, it is well settled that a union lawfully may seek the discharge of an employee whose dues are in arrears if it has a valid union-security clause in its collective-bargaining agreement with the employer. *The Radio Officers' Union of the Commercial Telegraphers Union, A.F.L.* [*Bull Steamship Co.*] v. *N.L.R.B.*, 347 U.S. 17, 40–41 (1954). Furthermore, a valid union-security clause can be enforced at the hiring hall level by a refusal to refer an employee whose dues are in arrears, so long as the employee has already worked for the statutory grace period in the bargaining unit to which the collective-bargaining agreement containing the union-security clause applies. *Mayfair Coat & Suit Co.*, 140 NLRB 1333 (1963). However, the Board has held that a member has become delinquent in dues under a contract covering one bargaining unit cannot be denied employment under a contract covering a separate bargaining unit without affording him the statutory grace period in which to become current in his or her dues. [Citations omitted.]

As noted above, if it were assumed that the dues obligation was incurred by Kusterns while working for Guy F. Atkinson, and RPM is considered a member of the same multiemployer unit, the issue is whether RPM's subsequent entry into the International Agreement's different union-security clause applies.

Inasmuch as the agreements do not clearly refer to or resolve the differences in their respective union-security clauses, the obtaining rule is that stated in *N.L.R.B.* v. *International Union of Operating Engineers Local No. 12, supra* at 548–549, as follows:

> Since both contracts were in force, the question arises as to which took precedence with respect to the Pisgah job. The provisions of these two contracts are inconsistent with each other and since the contracts were entered into by the same parties and cover the same subject matter, it is a well settled

principle of law that the later contract supersedes the former contract as to inconsistent provisions. In re *Ferrero's Estate*, 142 Cal. App.2d 473, 298 P.2d 604, 607, 608 (1956); *Restatement, Contracts*, Sec. 408 (1932); 6 Corbin, Contracts, Sec. 1296 (2d ed., 1962); 17A C.J.S. Contracts Sec. 379, at pp. 441–442 (1963); 12 Cal.Jur.2d, Contracts, Sec. 123, at p. 235 (1953).

Since the International Agreement's union-security clause supersedes the inconsistent provision in the District Council provision, it is RPM as the sole signatory to this agreement which comprises "the bargaining unit to which the collective-bargaining agreement containing the union-security clause applies." *Iron Workers Local 118, et al. (Pittsburgh Des Moines Steel Company), supra.*

As initially found above, RPM Erectors, Inc., was not included in the same multiemployer unit as Guy F. Atkinson Construction Company and since Kusterns had not incurred any dues obligation while working for the RPM bargaining unit, he could not be required to pay his dues arrearages incurred while employed by Atkinson as a condition precedent for referral to RPM. Alternatively Respondent admittedly denied Kusterns' employment referral to RPM which was covered by the International Agreement's union-security clause without affording him the contractual grace period of Section 8(b)(2) of the Act, in which to become current in his supplemental dues. Accordingly, it is found that Respondent violated Section 8(b)(1)(A) and (2) of the Act by failing and refusing to refer Kusterns to employment by RPM on November 20 and 21, 1979.

C. *Alleged Coercion in Job Referrals*

Kusterns testified that on November 26, about 9 a.m., several union members were looking at the referral book. One unnamed and otherwise unidentified member inquired of Ward, "Is this all the jobs available for today?" Ward assertedly replied, "No, the damn best job I—I back door[ed] them already [sic]." Kusterns was not aware of jobs that were "backdoored."

Ward[13] did not recall the incident and specifically denied telling anyone that they had backdoored the best jobs. He indicated that it was unlikely that he made the comment since there was a plethora of jobs at the time; that backdooring traditionally occurred when jobs were scarce. There was no allegation or showing that the Union did engage in backdooring, nor was there any clear showing that the asserted abundance of work rendered the potential for favoritism so remote as to completely eliminate the coercive impact of the asserted statement. Counsel for Respondent made a motion to dismiss this allegation as *de minimis* and, because Kusterns smiled and laughed while testifying on this matter in a manner indicating that the comment, if made, was a joke, which was not coercive and which did not appear "to have any impact upon anybody." Respondent's counsel, during direct examination by counsel for the General Counsel, tried to note on the record that Kusterns smiled and laughed when he stated Ward's "backdoored" comment. He was requested to pursue the matter on cross-examination, which he failed to do. Kusterns' demeanor did not bespeak jest or, conversely, actual intimidation. As the Board stated in *United Steelworkers of America, Local 1397, AFL-CIO (United States Steel Corporation, Homestead Works)*, 240 NLRB 848, 849 (1979):

> In judging whether Bekich's statements to Diaz violated Section 8(b)(1)(A) of the Act, the test of misconduct is not what Bekich may have subjectively intended by his comments, nor whether any employee was, in fact, coerced or intimidated by the remarks. Rather, the test is whether the alleged offender engaged in conduct which tends to restrain or coerce employees in the rights guaranteed them in the Act. *United Steelworkers of America, AFL-CIO-CLC, Local Union 5550 (Redfield Company, a Division of Outdoor Sports Industries)*, 223 NLRB 854, 855 (1976); *Local 542, International Union of Operating Engineers, AFL-CIO* v. *N.L.R.B.*, 328 F.2d 850, 852 (3d Cir. 1964), enfg. 139 NLRB 1169 (1962), cert. denied 379 U.S. 826 (1964).

Respondent also argues that Kusterns is not a credible witness, demonstrating a lack of clear memory.

The fact that Ward initially stated he could not recall making the statement, his admission that backdooring was commonly discussed at the union hall, albeit in a joking manner, hence he may have mentioned backdooring, saying "You can't even backdoor a job," prior to denying making the statement, are inconsistent statements which, cojoined with demeanor and inherent probabilities, lead me to credit Kusterns.

Conclusion

As here pertinent,[14] Section 8(b)(1)(A) of the Act makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act. Ward's statement that the best jobs were being backdoored could reasonably be expected to restrain or coerce the employees in their rights under Section 7, particularly where, as here, the Union has previously been found to have unlawfully backdoored job applicants in derogation of its obligations as exclusive job referrer.[15]

Contrary to Respondent's assertion, this is not a *de minimis* violation nor is it isolated, as Administrative Law Judge Richard D. Taplitz found in *International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 433 (The Associated General Contractors of California, Inc.)*, 228 NLRB 1420, 1438 (1977), that the General Counsel had established that 76 employees were backdoored by Respondent to jobs in violation of the hiring hall procedures. "In the instant case, Respondent has not operated its hiring hall in a way that was neces-

[13] It is undisputed that Ward is an agent of Respondent. Further, there is no allegation that RPM is also responsible for any of the Union's actions. RPM has not been made a party hereto, hence RPM's culpability is not in issue.

[14] It is not alleged nor could it reasonably be contended that the statement was purely an internal union matter beyond the reach of Sec. 8(b)(1)(A).

[15] *International Alliance of Theatrical Stage Employees, Local No. 7 (Universal City Studios, Inc.)*, 254 NLRB 1139 (1981).

sary for the effective performance of its function of representing employees." Instead, it was found that Respondent operated its hiring hall in such a manner as to deny applicants their rights to fair representation. Further, there was no showing that the comment was made in a friendly or joking manner or that the plethora of jobs obviated or eliminated the impact of the statement as a warning to employees that the favor and goodwill of responsible union officials is to be nurtured and sustained. *International Longshoremen's Association, Local No. 1581, AFL-CIO (Elias Gonzales Guerra)*, 196 NLRB 1186 (1972), enfd. 489 F.2d 635 (5th Cir. 1974). Thus I find that Respondent, by Ward's statement during employee review of the dispatch book, violated Section 8(b)(1)(A) of the Act. Accordingly, the motion to dismiss the applicable portion of the complaint is denied.

D. *Alleged Threatening and/or Coercive Actions Regarding the Dispatch Book*

The complaint alleges that:

> On or about December 10, 1979, at Respondent's hall, Respondent, through Mattavich,[16] threatened individuals on the referrals list with physical harm when they asked to see the dispatch book[17] in order to discourage them from making such requests in the future.

It is uncontroverted that the dispatch book is maintained by the business agent assigned to dispatch employees. Kusterns reviewed the dispatch book on occasion and was never denied access to the record, except, he asserts, on December 10, 1979. Kusterns could not recall if Mattavich gave him access to the dispatch book on any of the other occasions he reviewed the record. According to Kusterns, when he arrived at the union hall, there were a lot of people reading the "out-of-work book," one of whom handed him the book. While he was reading the calls available on that day, Tom Wagner, as business agent employed by the Union, requested the book to permit him to note in it an incoming job call from a company. Kusterns complied and, when Wagner finished, he returned the book to Kusterns who again started to read it. About a minute later, Mattavich requested the book to "dispatch out" some members, and Kusterns complied. When Mattavich completed the dispatching about 10 to 15 minutes later, Kusterns again asked to see the book.

Kusterns then testified that:

> Mr. Mattavich replied to me . . . "Fuck you, you haven't got any God damned business in this hall. Get your ass out of here."
>
> And I told him, "I got just as much business in this hall as anybody else." And he say—pointed out to the door, "Well, why don't you take a trip downtown?"
>
> And I—I asked him again for the book, and he told me, "Why don't you do something about?" And I told, "I'm going to do something about, I'm going to take the—if you give the book away to anybody else in this hall, I'm going to take the book, I'm going to take it to my car and read it, and you do whatever damn please you."
>
> So Mr. Mattavich stood on the—on the podium,[18] holding the book, in an angry manner,[19] and kept telling me, "Why don't you do something about it?" After that incident I just left. I didn't have any—that's all there was.

According to Kusterns, Mattavich made these statements in a loud voice. He claims to have mentioned the incident to Lansford after the hall was closed and Lansford said he had the right to look at the book and he would "take care of it."[20]

Mattavich testified that he was the only dispatcher at the time and that he was very busy, in need of the dispatch book, when Kusterns, who had the book once and voluntarily returned it,[21] requested the book a second time when Mattavich was using it, had to record another job, and to make more dispatches since some bids had been made on jobs. Accordingly, he stated, he refused to give Kusterns the book in a normal tone of voice without using profanity and he did not say, "Come and get it." According to Mattavich, he did not tell Kusterns he could have the book when he was done, for that was a matter of custom of which Kusterns had knowledge.

Conclusions

Based on demeanor, demonstrated clarity of recollection, and Kusterns' candor that he used profanity in talking to Mattavich, not an unusual occurrence at the hall, Kusterns' testimony, as stated above, is credited. This testimony does not reveal a threat of physical harm and Respondent, in its motion to dismiss, so argues. However, the fact that Lansford admitted that Kusterns had a right to the book and the Union's practice regarding access to the book were facts placed in evidence without objection. Therefore, the question of whether Mattavich's refusal to give Kusterns the book when so requested after finishing dispatching employees was violative of Section 8(b)(1)(A) of the Act was fully and fairly tried with no allegation of deprivation of due process.

As the Board found in *Local No. 324, International Union of Operating Engineers, AFL-CIO (Michigan Chapter, Associated General Contractors of America)*, 226

[16] Matt Mattavich is a business agent with the Union.

[17] The dispatch book is a union record listing the jobs to be filled, the name of the company, the job classification, and the individuals, if any, who were dispatched to the job.

[18] The podium was in a glass enclosure.

[19] Kusterns later stated that Mattavich held the book in his right hand, that the right arm was bent at a right angle and his hand was approximately ear level. Then he dropped his hand and the book was no longer visible.

[20] Lansford did not appear and testify.

[21] Counsel for the General Counsel asserts that it is incredible that Kusterns, who had not finished reading the book, would voluntarily give up the book and then ask for it back when Mattavich finished with it. Hence it is argued that Mattavich's testimony is not credible. This argument is found to be without merit for it overlooks the possibility that Kusterns may have finished his review of the book and then, upon reflection, wished to double check an item or look at an additional matter initially not read.

NLRB 587 (1976), a union which operates an exclusive hiring hall must, under the doctrine of the duty of fair representation, permit a referral applicant to view the union's referral records. Cf. *Bartenders' and Beverage Dispensers' Union, Local 165 (Nevada Resort Association)*, 261 NLRB 420 (1982), and cases cited therein. Accordingly, I conclude that Respondent, through its agent, Mattavich, refused Kusterns reasonable access to the dispatch book thereby violating its duty of fair representation in violation of Section 8(b)(1)(A) of the Act.

E. *Respondent's Other Defenses*

1. *Res Judicata* or collateral estoppel

Respondent asserts that the issues presented in this case should be resolved through arbitration pursuant to Section 5M of the District Council Agreement, which provides:

> In the event any job applicant is dissatisfied with his Group Classification or his order of referral in that such applicant claims he was not placed in the proper Group set forth above or is aggrieved by the operation of the hiring arrangement or the provisions of this Section, such aggrieved job applicant may appeal in writing within 10 (ten) days from the day on which his complaint arose to an Appellate Tribunal consisting of a representative selected by the Employers and a representative selected by the Union and an impartial Umpire appointed jointly by the Employers and the Union, and the decision of the Appellate Tribunal shall be final and binding.

As noted by Administrative Law Judge Richard D. Taplitz, who considered the same clause in *International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 433, supra* at 1439–40:

> In *International Association of Bridge, Structural and Ornamental Ironworkers, Local 118, AFL–CIO (Bostrom-Bergen)*, 219 NLRB 467 (1975), the Board ruled on the same contract clause. The Administrative Law Judge in that case held that the aggrieved party was opposed to the position of the Union, and there was no assurance that representatives of the employers or the union, who together with an impartial umpire, composed the appellate tribunal whose decision was final and binding, would fairly represent the aggrieved party in his grievance against the union's administration of the hiring hall. The Board agreed with the Administrative Law Judge that the issue should not be deferred to arbitration under the *Collyer* doctrine, 192 NLRB 837 (1971), noting that the union was represented on the tribunal but that the employees were not. In addition, deferral to arbitration is inappropriate where the interests of the aggrieved employee are in apparent conflict with the interests of the parties to the contract. *Local Union 675, International Brotherhood of Electrical Workers, AFL–CIO (S & M Electric Co.), supra.* In the instant case, the interests of the discriminatees who were deprived of referral from the hall are in clear conflict with the interests of the Union.

The Board affirmed Administrative Law Judge Taplitz. The logic of the Board's prior decisions on this issue still obtains in this case which also involves a clear conflict of interest between Kusterns and the Union. Therefore, deferral is found to be inappropriate.

Also, Respondent, on the day this hearing occurred, filed a complaint in district court seeking declaratory relief alleging that the suit filed in 1977 by Kusterns in Action No. 00317, Los Angeles Superior Court, and appealed, resulted in the finding that there was a contractual remedy available. This state court action assertedly litigated the issue of contractual remedy and, in the situation which obtained in *International Association of Bridge, Structural and Ornamental Iron Workers Local No. 433, supra*, the state court's decision should estop this action, even if filed prior to the events complained of herein.

Respondent argues that *N.L.R.B.* v. *Walter E. Heyman, d/b/a Stanwood Thriftmart*, 541 F.2d 796 (9th Cir. 1976), is dispositive of the issue requiring the Board to be bound by the decision of the State of California. This argument is not persuasive for the *Heyman* case involved a contract review proceeding brought in Federal court pursuant to Section 301 of the Act. As the court noted in *Danculovich* v. *Peter Eckrich and Sons*, 110 LRRM 2110 at 2112, 97 LC ¶ 10,018 (D.C. Mich. 1982):

> It cannot be said that plaintiff's claim . . . is either peripheral to the federal scheme or so touches local concern as to require protection exceeding that provided by the NLRB. Accordingly, the claim does not fall within the class of cases which constitute exceptions to the preemption doctrine.

Similarly, Respondent has failed to demonstrate with any particularity or clarity why this case should be considered an exception to the preemption doctrine nor can any such basis be inferred from the salient facts considered herein. Further, as the court observed in *Gulf States Manufacturers, Inc.* v. *N.L.R.B.*, 598 F.2d 896 at 901 (5th Cir. 1979):

> Section 10(a) of the Act explicitly provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." Accordingly, the "parties cannot by contractual agreement divest the Board's function to operate in the public interest." *Boire* v. *Int'l Brotherhood of Teamsters*, 479 F.2d 778, 803 (5th Cir. 1973).

Also, Respondent's initiation of action in Federal court on the date of this hearing does not deprive the Board of its exclusive statutory jurisdiction under Section 10(a) of the Act to adjudicate unfair labor practice disputes or suspend its obligation to proceed with such adjudication. *Aacon Contracting Company, Inc.*, 127 NLRB 1250 (1960); *La Mirade Trucking Inc.* v. *Teamsters Local Union 166, International Brotherhood of Teamsters, Chauffeurs,*

Warehousemen and Helpers of America, 538 F.2d 286, 288 (9th Cir. 1976), cert. denied 429 U.S. 1062 (1977); *Fiberboard Paper Products Corp.* v. *East Bay Union of Machinists, Local 1304*, 344 F.2d 300 (9th Cir. 1965), cert. denied 382 U.S. 826.

Respondent's reliance on *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965), as requiring exhaustion of contractual remedies, is misplaced for the Court therein noted that there were cases which justify exceptions to the rule of fostering resolution of contract disputes through arbitration such as those exceptions established under the *Collyer* doctrine, *supra.*[22]

In sum, I find that Respondent violated Section 8(b)(1)(A) and (2) of the Act by failing and refusing to dispatch Kusterns to employment by RPM Erectors, Inc., at Lankersheim Boulevard, North Hollywood, California, on or about November 20, 1979. Respondent violated Section 8(b)(1)(A) of the Act by telling job applicants that the best jobs were "backdoored" in derogation of established contractual hiring hall procedures. Respondent also violated Section 8(b)(1)(A) of the Act by violating its duty of fair representation to Kusterns by denying him the right to review the dispatch book.

2. Mitigation of remedy sought

Respondent argues that Kusterns failed in his obligation to mitigate damages because he bid on very few jobs. That he was probably ineligible for referral to those jobs, it is urged, is not persuasive for it was due to his own personal choice to "take himself out of the labor market by failing to comply with his union-security obligation, an obligation sanctioned by the Board." Citing *DeLorean Cadillac, Inc.* v. *N.L.R.B.*, 614 F.2d 554 (6th Cir. 1980).

The *DeLorean* decision, *ibid.*, is a review of a Supplemental Decision and Order of the Board which awarded backpay. In the instant proceeding, there was no evidence adduced regarding the specific jobs Kusterns may have been eligible for in light of the decision herein or tangible evidence probative that Kusterns "breached his duty to mitigate his losses." *Id.* at 555. Therefore, it is found that mitigation of Respondent's liability for backpay has not been shown to be warranted at this juncture. Accordingly, it is concluded that this issue would most appropriately be considered during the compliance phase of the proceeding.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with the business operations of the Employer set forth in section, I above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) and (2) of the Act, I recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I recommend that Respondent be ordered to operate its exclusive hiring hall in a nondiscriminatory manner. In *Sheet Metal Workers' Union Local 355, Sheet Metal Workers' International Association, AFL-CIO (Zinsco Electrical Products)*, 254 NLRB 773 (1981), and *Iron Workers Local 118, International Association of Bridge and Structural Ironworkers, AFL-CIO (Pittsburgh Des Moines Steel Company)*, 257 NLRB 564 (1981), the Board held that where a union's refusal to refer a job applicant to employment in violation of Section 8(b)(1)(A) and (2) of the Act is not accompanied by a finding of culpability on the part of the employer, the remedy established in *Pen and Pencil Workers Union Local 19593, AFL (Parker Pen Company)*, 91 NLRB 883 (1950), of tolling a union's backpay liability 5 days after it notifies both the employer and the employee that it no longer objects to the employee's employment, is no longer applicable. Accordingly, Respondent should be ordered to make Kusterns whole for any loss of pay or other benefits he may have suffered by reason of the discrimination against him from the date of Respondent's unlawful conduct until he obtains the employment which he would have had were it not for Respondent's unlawful conduct, substantially equivalent employment with RPM Erectors, Inc., or substantially equivalent employment elsewhere. Backpay shall be computed in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest thereon as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[23] Respondent, as is usually the case, shall be afforded the opportunity to present evidence that its backpay obligation should be mitigated because of Kusterns' actions.

It is further recommended that Respondent be ordered to preserve and, upon request, make available to the Board or its agents, for examination and copying, all records pertaining to employment through its hiring hall and all records relevant and necessary for compliance with this recommended Order.

CONCLUSIONS OF LAW

1. RPM Erectors, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material herein, Respondent has been a party to a collective-bargaining agreement with various associations and employers, under which Respondent operates an exclusive hiring hall. The criteria for dispatch from that hall are set forth in that contract.

[22] It is noted that in the case cited by Respondent, the Court emphasized that the employee who asserted the employer was guilty of wrongdoing had the union to represent him, unlike the instant case where the Union's interests are hostile to those of the employee. See *N.L.R.B.* v. *Brotherhood of Railway, Airline and Steamship Clerks*, 498 F.2d 1105, 1109-10 (5th Cir. 1974); Cf. *TIME-DC, Inc.* v. *N.L.R.B.*, 504 F.2d 294, 303 (5th Cir. 1974); and *Kansas Meat Packers, a Division of Aristo Foods*, 198 NLRB 543 (1972).

[23] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

4. Respondent violated Section 8(b)(1)(A) and (2) of the Act by failing and refusing to refer Waldo F. Kusterns to employment by RPM Erectors, Inc., at Lankersheim Boulevard, North Hollywood, California, because he failed to pay dues although he was under no obligation to do so in order to obtain such employment, and from telling Kusterns it is refusing to refer him for this reason.

5. Respondent violated Section 8(b)(1)(A) of the Act by (a) telling employees that the best jobs had been "backdoored" in derogation of established contractual hiring hall procedures; and (b) by violating its duty of fair representation to Kusterns by denying him the right to review the dispatch book.

[Recommended Order omitted from publication.]